BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SANDRA LOUISE HINES Claimant	)	
VS.	)	Docket No. 1,034,400
STORMONT VAIL HEALTHCARE, INC. Self-Insured Respondent	)	

ORDER

Respondent requests review of the September 13, 2007 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

Citing *Rinke*[1], the Administrative Law Judge (ALJ) found that the claimant's accident arose out of and occurred in the course of her employment with respondent and ordered respondent to provide medical care with Dr. Rattay and to pay claimant's medical bills as authorized medical.[2]

The respondent requests review of this Order and alleges that *Rinke* does not apply to the instant set of facts. Respondent maintains *Thompson*[3] governs and compels the Board to reverse the ALJ's Order because respondent had no control over the parking area where claimant slipped and fell.

Claimant argues that she was injured in the course of her employment and the ALJ's Order should be affirmed in all respects.

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[1] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

[2] ALJ Order (Sept. 13, 2007) at 1.

[3] *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant met with personal injury by accident on January 18, 2007 while walking in from the parking lot on her way to work. The issue to be addressed is whether that accident "arose out of and in the course of" her employment with respondent.

The evidence is largely undisputed. Claimant is employed by respondent, who is one of many tenants within a building known as the Newman Medical Plaza, which is owned by Newman Memorial County Hospital. Respondent occupies one entire floor and part of another. Claimant testified that respondent's employees - and those of the other tenants - were directed to park in an "employee only" area. This area, which was designated by the building owner, required a key card to enter and only when this area was full was claimant and the other employees permitted to park in another area of the parking lot which is openly available to the general public.

The Lease between respondent and the owner of building only provides for a "sufficient parking area to conform to the needs of the Building"[4] and reserves the obligation for parking lot maintenance for the owner. And when someone falls in the parking lot, respondent's employees would refer those individuals to the building's owner, Newman Memorial County Hospital, which operates an emergency room. Conversely, respondent's representatives testified that if someone is injured within the leased space, respondent will provide treatment to the injured individual.

On the date in question, claimant was walking in from the designated parking lot when she slipped and fell on ice. She struck her right knee and right elbow.[5] Claimant notified her employer and was referred to the emergency room for treatment. While in the emergency room, claimant was told to go see her own physician as she "wasn't supposed to be seen there."[6]

Claimant ultimately found her way to Dr. Rattay who performed surgery to her right elbow. She continues to have numbness in her elbow.

Distilled to its essence, this case involves what is commonly referred to as the "going and coming" rule and a determination of whether claimant was injured on her

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[4] P.H. Trans., Resp. A at 9 (section 34 of the Lease agreement).

[5] *Id.* at 39.

[6] *Id.* at 15.

employer's premises or that of the building owner's premises. One gives rise to workers compensation liability while the other does not.

The "going and coming" rule contained in K.S.A. 2006 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2006 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[7] In *Thompson*,[8] the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2006 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[9] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[10]

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[7] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[8] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[9] *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[10] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

Rather recently, the Kansas Supreme Court expanded the concept of an employer's premises. In *Rinke*, the Supreme Court reversed the Court of Appeals' decision which attempted to limit the scope of the term "premises". In *Rinke*, the employer was one of two tenants within a building and occupied 97 percent of the parking spaces available in the adjacent parking lot. The essence of respondent's business was such that most if not all of the visitors to the building would either be respondent's employees or those of the other, significantly smaller tenants in the building. Respondent's employees were told which section of the parking lot where they could park. Ms. Rinke parked in this area and slipped on an icy patch while walking in to work.

The Supreme Court concluded that claimant's accident was not precluded by the "going and coming" rule because it saw "little practical difference" between Ms. Rinke's factual situation "and those where an employer owns the building and its adjoining employee parking lot."[11] In reversing the Court of Appeals and affirming the Board's decision in favor of compensability, the *Rinke* Court noted several indicia that supported its belief that claimant fell on respondent's "premises", at least for purposes of workers compensation coverage. Those included the fact that the parking lot was adjacent to the building where Ms. Rinke worked, the respondent leased a substantial portion of the building and the parking lot, a portion of the lot was set aside for the respondent's employees and Ms. Rinke was directed to park in that area and it was in that area where she fell. For these reasons, the *Rinke* Court concluded that claimant was on her employer's "premises" and therefore her fall was compensable.

Respondent maintains that these facts are altogether distinguishable from *Rinke* and more like those in *Thompson*. The ALJ rejected respondent's argument and applied the *Rinke* rationale, finding in favor of claimant. The ALJ offered the following reasoning for his findings:

> It strikes the court that although the intent may have been to separate the employer [respondent] from liability regarding parking lot accidents, Stormont [respondent] was in fact exercising a form of control over the lot by directing which entity would administer emergency care. The court recognizes Stormont's [respondent's] insistence on claimant parking in the specific area of the lot was, in part, an effort to carry out the policies of the landlord, Newman County Hospital. However, said policy was not recorded within the lease agreement, which states the Hospital is required to provide a "sufficient parking area to conform to the needs of the Building." There does not otherwise appear in the agreement a clause which limits the employees of Stormont [respondent] to a particular area within the parking lot.[12]

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[11] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

[12] ALJ Order (Sept. 13, 2007) at 2.

The ALJ went on to note that respondent's obvious willingness to direct its employees to a particular parking area was not required under the parties' lease, but was rather an attempt to ensure available space in which patients could park. For all these reasons, the ALJ found that claimant's accidental injury arose out of and in the course of her employment with respondent.

This Board Member has considered the parties' arguments and concludes the ALJ's analysis is supported by *Rinke*. For purposes of the "going and coming" rule, an employer's premises has recently expanded and not only encompasses the actual lease space, but that area where the respondent directs its employees to be on a regular basis, when that area is not one that is generally available or open to the public, *such as a parking lot where the employee is directed to park.* The ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[13] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 13, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
James C. Wright, Attorney for Respondent/Self Insured
Brad E. Avery, Administrative Law Judge

[13] K.S.A. 44-534a.